

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 209 Emotional Support Animals

SPONSOR(S): Children, Families & Seniors Subcommittee, Civil Justice Subcommittee, Killebrew and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1084

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Frost	Luczynski
2) Children, Families & Seniors Subcommittee	15 Y, 0 N, As CS	Woodruff	Brazzell
3) Judiciary Committee		Frost	Luczynski

SUMMARY ANALYSIS

Federal law places certain obligations on housing providers under the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA), relating to assistance animals.

The FHA prohibits disability discrimination in both private and public housing access, with limited exceptions, while Section 504 prohibits disability discrimination by any housing provider receiving federal financial assistance. Both the FHA and Section 504 require a housing provider to make a reasonable accommodation for an assistance animal, which includes an:

- Animal that works, provides assistance, or performs tasks; or
- Emotional support animal (ESA).

The ADA prohibits disability discrimination in state and local government facilities and public accommodations and requires such entities to make necessary modifications for a person with a disability, including accommodating a service animal. The ADA narrowly defines service animal as a dog trained to do work or perform tasks benefitting a person with a disability. An ESA is not a service animal.

Florida law mirrors federal requirements for service animals in public accommodations and requires equal access to housing accommodations for an individual with a service animal, but does not provide guidelines for other assistance animals, such as an ESA. As such, a housing provider complying with Florida law by accommodating only service animals may be violating federal law relating to ESAs.

CS/CS/HB 209 amends Florida's Fair Housing Act by prohibiting discrimination in housing rental to an individual needing an ESA. The bill defines ESA, requires a housing provider to offer equal access to a person with an ESA, and prohibits additional fees for an ESA. The bill permits a landlord to:

- Prohibit an ESA under certain circumstances; and
- Request additional information regarding an ESA, including written documentation:
 - From a listed type of licensed health care practitioner;
 - Verifying the applicant has a disability or disability-related need; and
 - Verifying the ESA provides support alleviating one or more symptoms or effects of the disability or disability-related need.

The bill requires the Florida Commission on Human Relations to establish the format for and adopt rules relating to ESA documentation.

The bill creates a new cause for disciplinary action against a health care practitioner's license when the practitioner's only service to a patient is providing ESA documentation for a fee.

The bill creates the misdemeanor crime of falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an ESA. The bill removes liability for damage done by an ESA for a landlord complying with ESA guidelines and requesting appropriate ESA documentation.

The bill may have an indeterminate positive impact on jail beds.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal law places certain obligations on housing providers under the Fair Housing Act (FHA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA), relating to assistance animals.

FHA and Section 504

The FHA and the U.S. Department of Housing and Urban Development's (HUD)¹ implementing regulations prohibit discrimination in housing access based on a person's disability, and applies to most housing types, with limited exceptions.² Section 504 prohibits disability discrimination by housing providers receiving federal financial assistance from HUD. Both the FHA and Section 504 require a covered housing provider to make reasonable accommodations for assistance animals.

Assistance Animals

According to HUD, an assistance animal is not a pet; it is an animal that:

- Works;
- Provides assistance;
- Performs tasks; or
- Provides emotional support alleviating one or more identified symptoms or effects of a disability.³

A dog is the most common type of assistance animal, but there appears to be no limit to the type of animal that may qualify as an assistance animal, so long as the animal lessens the symptoms of the person's disability.⁴ An assistance animal does not require any training or certification, and may perform a variety of disability-related functions, such as:

- Guiding a person who has low vision or is blind;
- Alerting a deaf or hard of hearing person to sounds;
- Protection or rescue assistance;
- Pulling a wheelchair;
- Retrieving items;
- Alerting a person to an impending seizure; or
- Being an emotional support animal (ESA) to a person with a disability who has a disability-related need for such support.⁵ An ESA may provide therapeutic support to relieve symptoms of psychiatric disabilities, including depression, anxiety, and post-traumatic stress disorder.⁶

¹ HUD is the Federal agency responsible for national policy and programs addressing America's housing needs, improving and developing the Nation's communities, and enforcing fair housing laws, including violations of the Fair Housing Act. HUD.GOV, *Questions and Answers about HUD*, <https://www.hud.gov/about/qaintro> (last visited Jan. 28, 2020).

² In limited circumstances, the FHA exempts: owner occupied buildings with no more than four units; single-family houses sold or rented by an owner without using an agent; and housing operated by religious organizations and private clubs limiting occupancy to members; HUD.GOV, *Housing Discrimination under the Fair Housing Act*, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_What_Types_of (last visited Jan 28, 2020); 42 U.S.C.A. s. 3601 *et seq.*; 24 C.F.R. s. 100.10.

³ U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2013-01, (Apr. 25, 2013), https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf (last visited Jan. 28, 2020).

⁴ Deborah Thorpe, *HUD Clarifies Definition of Assistance Animals Under FHA and Section 504*, NHLP, <http://www.nhlp.org/files/2014supplement/Chapter03/FN%20124.2%20%20HUD%20Clarifies%20Definition%20of%20Assistance%20Animals%20in%20FHA%20&%20Section%20504%20-%20Hous.%20L.%20Bull.pdf> (last visited Jan 28, 2020).

⁵ U.S. Department of Housing, FHEO Notice, *supra* note 3.

⁶ Brazelon Center for Mental Health Law, *Right to Emotional Support Animals in "No Pet" Housing*, (Jun. 16, 2017), <http://www.bazelon.org/wp-content/uploads/2017/04/2017-06-16-Emotional-Support-Animal-Fact-Sheet-for-Website-final.pdf> (last visited Jan. 28, 2020).

Reasonable Accommodations

A reasonable accommodation request under the FHA or Section 504 covers the following individuals with a disability-related need:

- A tenant;
- An applicant;
- A family member; and
- Any other person associated with a tenant or applicant.⁷

A housing provider must evaluate a reasonable accommodation request relating to a covered individual's request for an assistance animal in the same manner as any other reasonable accommodation request, and must consider whether the requesting person has a:

- Disability;⁸ and
- Disability-related need for the assistance animal.⁹

If the answer to either consideration is no, then neither the FHA nor Section 504 require a housing provider to modify any pet-related policy, and the request may be denied. If the answer to both considerations is yes, both the FHA and Section 504 require a housing provider to modify any pet-related rules in any way necessary to allow the requesting person to use his or her assistance animal in all areas where other tenants are permitted to go, unless an accommodation for the animal in question would:

- Result in an undue financial and administrative burden;
- Fundamentally alter the housing provider's services;
- Pose a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
- Cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.¹⁰

A housing provider evaluating a reasonable accommodation request for an assistance animal may not inquire about the existence, nature, or extent of a disability or disability-related need if the disability and disability-related need are readily apparent or already known to the provider.¹¹ However, a housing provider may request reliable documentation of a person's disability and/or disability-related need if either is not readily apparent or known to the housing provider. For example, a person seeking a reasonable accommodation for an ESA may be asked to provide documentation from a:

- Physician;
- Psychiatrist;
- Social worker; or
- Other mental health professional.¹²

Once a reasonable accommodation request for an assistance animal is individually evaluated, the request may not be:

- Unreasonably denied;

⁷ See 24 CFR §§. 100.202 and 100.204; 24 C.F.R. §§. 8.11, 8.20, 8.21, 8.24, and 8.33.

⁸ Disability means a physical or mental impairment that substantially limits one or more major life activities. U.S. Department of Housing and Urban Development, FHEO Notice, *supra* note 3.

⁹ Disability-related need means that the animal works, provides assistance, performs tasks or services, or provides emotional support alleviating one of more identified symptoms or effects of the person's existing disability. *Id.*

¹⁰ Determining whether an assistance animal poses a direct threat of harm or would cause substantial physical damage to the property of others must be based on an individualized assessment of the animal, relying on objective evidence about the specific animal's actual conduct and not on speculation or fear about the type of harm or damage an animal may cause or evidence about harm or damage that other animals have caused. *Id.*

¹¹ For example, a provider may not request documentation regarding a guide dog from a person who is blind or has limited vision. *Id.*

¹² Documentation is acceptable if it sufficiently establishes that an individual has a disability and the animal will provide some type of disability-related assistance or emotional support, and the provider may not request medical records or any other detailed information regarding a person's physical or mental impairments. *Id.*

- Conditioned on paying a fee or deposit (or any other condition routinely applied to pets);¹³ or
- Unreasonably delayed.

ADA

In addition to the obligations under the FHA and Section 504, a housing provider may also need to comply with a separate set of obligations under the ADA.¹⁴ The ADA prohibits discrimination in public accommodations based on disability. The ADA provides similar protection to a disabled person as the protections provided to a person based on his or her race, color, sex, national origin, age, and religion. The ADA contains five sections known as “titles,” each relating to a different area of public life:

- Title I – Employment;
- Title II – State and Local Government;
- Title III – Public Accommodations;¹⁵
- Title IV – Telecommunications; and
- Title V – Miscellaneous Provisions.

In the housing context:

- Title II applies to:
 - Public entities providing housing, such as:
 - Public housing agencies; and
 - Housing provided by state and local government, including housing at state universities and other educational facilities.
- Title III applies to:
 - Public accommodations, such as:
 - Rental offices;
 - Shelters;
 - Some types of multifamily housing;
 - Assisted living facilities; and
 - Housing at public education institutions.

A business or entity falling under Title II or Title III must make reasonable modifications to its policies, practices, and procedures when serving a person with a disability, including a reasonable modification necessary to accommodate a service animal.¹⁶

Service Animals

The ADA defines a service animal narrowly as a dog trained to do work or perform tasks benefitting a person with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.¹⁷ A service dog is not considered a pet, and other species of animals may not be service animals, except an entity must provide reasonable accommodations or policy modifications to allow a disabled person to use a miniature horse¹⁸ if the horse is trained to do work or perform tasks for a disabled person. The ADA specifically excludes ESAs from qualifying as a service animal.¹⁹ Common tasks a service animal may perform include:

¹³ A housing provider may require a tenant to cover costs of any repairs for damage the animal causes to a dwelling unit or common area, with the exception of reasonable wear and tear, if the provider’s common practice is to assess tenants for damage they cause to the premises. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act*, May 17, 2004, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf (last visited Jan. 28, 2020).

¹⁴ 42 U.S.C. § 12101, *et seq.*

¹⁵ 42 U.S.C. § 12181(7).

¹⁶ ADA National Network, *Service Animals and Emotional Support Animals, Where are they allowed and under what conditions?* <https://adata.org/publication/service-animals-booklet> (last visited Jan. 28, 2020).

¹⁷ 28 C.F.R. §§ 35.104 and 36.104.

¹⁸ A public accommodation may use certain assessment factors to determine if reasonable modifications may be made to allow a miniature horse (horse) into a facility, including: The type, size, and weight of the horse relative to the facility’s ability to accommodate these features, whether the horse’s handler is able to sufficiently control the horse, whether the horse is housebroken, and whether the horse’s presence in the facility compromises legitimate safety requirements; 28 C.F.R. §§ 35.136(i) and 36.302(c)(9).

¹⁹ The ADA specifies that “emotional support, well-being, comfort, or companionship do not constitute work or tasks.” 28 C.F.R. §§ 35.104 and 36.104.

- Pulling a wheelchair;
- Retrieving dropped items;
- Alerting a person to a sound;
- Reminding a person to take medication; or
- Pressing an elevator button.²⁰

Examples of animals meeting the ADA's definition of service animal, include a:

- Guide dog trained to serve a visually impaired person;
- Hearing or signal dog trained to alert a hearing impaired person;
- Psychiatric service dog trained to detect and lessen the effect of a psychiatric episode;
- Sensory signal dog trained to assist an autistic person; and
- Seizure response dog trained to assist a person with a seizure disorder.²¹

The ADA's definition of service animal covers any state or local government program, service, activity, or facility, and also public accommodations, such as:

- Leasing offices;
- Social service center establishments;
- Universities; and
- Other educational facilities.²²

If an individual's disability and his or her service animal's work or tasks are not obvious, a covered public accommodation may only ask:

- If the dog is a service animal the person requires because of a disability; and
- What work or tasks the animal is trained to perform.

A public accommodation may not request documentation or proof showing an animal is certified, trained, or licensed as a service animal, nor may the entity request an access fee or surcharge to accommodate a service animal.²³ A service animal is exempt from any local law prohibiting a certain dog breed.²⁴

Because the ADA expressly excludes ESAs, access to or reasonable modifications in public accommodations is not required for ESAs under the ADA. However, access to an ADA-covered facility may not be denied to a service animal, and the animal must be allowed in all areas where member of the public may normally be present, unless the animal is:

- Out of control and its handler does not take effective action to control it;
- Not housebroken; or
- Poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices, and procedures.^{25 26}

²⁰ ADA National Network, *supra* note 16.

²¹ *Id.*

²² U.S. Department of Housing and Urban Development, FHEO Notice, *supra* note 3.

²³ *Id.*

²⁴ *Id.*

²⁵ Such a determination must be based on an individual assessment of the animal's conduct, not on fear, stereotype, or generalization.

²⁶ 28 C.F.R. § 35.136; 28 C.F.R. § 36.302(e).

Applying FHA, Section 504, and ADA Laws

While the FHA, Section 504, and ADA laws each apply to different types of housing, certain entities are covered by both the ADA service animal requirements and the FHA and Section 504 reasonable accommodation requirements for assistance animals, including ESAs, such as:

- Public housing agencies;
- Some public accommodations:
 - Rental offices;
 - Shelters;
 - Residential homes;
 - Some multi-family housing;
 - Assisted living facilities; and
- Educational facility housing.²⁷

Because compliance with FHA and Section 504 requirements does not guarantee compliance with the ADA, an entity covered by both requirements must ensure compliance with all relevant laws. This is especially relevant when dealing with ESAs, because an ESA that does not qualify as a service animal under the ADA may nevertheless qualify for a reasonable accommodation as an assistance animal under the FHA and Section 504.

When all three laws apply, HUD recommends a housing provider start by first applying the ADA service animal test, because if the animal qualifies as a service animal, it must be permitted to accompany the individual, absent the three limitations outlined above. However, a public entity or public accommodation operating a housing facility may not use the ADA definition of service animal to reduce the obligations required under the FHA and Section 504.²⁸ If the animal does not meet the ADA service animal test, then a housing provider should evaluate the request in accordance with the FHA and Section 504 guidelines, including requesting reasonable documentation regarding a person's disability or disability-related need for an assistance animal, when appropriate.²⁹ However, HUD is clear it is the housing provider's responsibility to know the applicable laws and comply with each of them.³⁰

Florida Law

Under Florida's Fair Housing Act,³¹ a person may not discriminate³² in any manner during the sale or rental of a dwelling³³ based on the handicap of a:

- Buyer or renter;
- Person residing in or intending to reside in the dwelling; or
- Any person associated with the buyer or renter.³⁴

A handicap means a person has a:

- Physical or mental impairment substantially limiting one or more major life activities;
- Record of having or is regarded as having a physical or mental impairment substantially limiting one or more major life activities; or
- Developmental disability.³⁵

²⁷ U.S. Department of Housing and Urban Development, FHEO Notice, *supra* note 3.

²⁸ 75 Fed. Reg. at 56166, 56240 (Sept. 15, 2010).

²⁹ U.S. Department of Housing and Urban Development, FHEO Notice, *supra* note 3.

³⁰ *Id.*

³¹ Ss. 760.20–760.37, F.S.

³² Discrimination includes: refusing to permit reasonable modifications (at the expense of the handicapped person) of existing premises or in the rules, policies, practices, or services when necessary for the person to fully enjoy the premises. S. 760.23(9), F.S.

³³ Dwelling means any building or structure, or portion thereof, which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location on the land of any such building or structure, or portion thereof. S. 760.22(4), F.S.

³⁴ Ss. 760.23(7)–(8), F.S.

³⁵ Developmental disability means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. S. 393.063(12), F.S.

While Florida's Fair Housing Act does not specifically address service animals or assistance animals, s. 413.08, F.S., lists the rights and responsibilities of a person with a disability relating to:

- Using a service animal;
- Discrimination in public employment;
- Public accommodations; and
- Housing accommodations.

Section 413.08, F.S., mirrors the federal ADA requirements relating to service animals and does not address rights relating to ESAs or other assistance animals, but acknowledges they exist under other laws.³⁶

Service Animals

Florida defines a service animal similarly to the ADA and provides comparable requirements and restrictions regarding access to public accommodations with a service animal.³⁷ A person knowingly and willfully misrepresenting himself or herself as being qualified to use a service animal commits a second degree misdemeanor, punishable by up to 60 days in county jail and a \$500 fine.³⁸

Florida's housing accommodation requirements dictate that a:

- Housing provider must offer a person with a disability the same access to housing as a person not having a disability,³⁹ except a person having a disability may reside with a service animal in a location which may not normally permit pets and may not be charged an additional fee relating to a service animal;⁴⁰
- Disabled person is liable for any damage done to the housing accommodation or to another person on the premises by his or her service animal; and
- Housing accommodation may request proof a service animal complies with vaccination requirements.⁴¹

Florida courts have held that an accommodation is unreasonable if it:

- Poses an undue financial and administrative burden on a housing provider; or
- Fundamentally alters the nature of the housing provider's operations.⁴²

Section 413.08, F.S., expressly prohibits any interpretation of Florida's disability-related housing laws which would limit the rights or remedies available under federal law.⁴³ However, because Florida law does not address ESAs or other assistance animals, a housing provider complying with Florida law by accommodating only service animals may be violating federal law relating to ESAs. As a result, courts have found some housing providers in violation of federal law despite the providers' compliance with Florida law.⁴⁴ In addition to legal confusion, a lack of guidance relating specifically to ESAs has resulted in some tenants, in multiple states, purchasing false ESA certification documentation from unqualified online providers.⁴⁵

³⁶ S. 413.08(6)(c), F.S.

³⁷ S. 413.08(1)(c)–(3)(f), F.S.

³⁸ Ss. 775.082 and 775.083, F.S.

³⁹ *Id.*

⁴⁰ S. 413.08(6), F.S.

⁴¹ S. 413.08(6)(b), F.S.

⁴² *Schwarz v. City of Treasure Island*, 544 F. 3d 1201, 1218-19 (11th Cir. 2008).

⁴³ S. 413.08(6)(c), F.S.

⁴⁴ *See Warren v. Delvista Towers Condominiums Ass'n, Inc.*, 49 F. Supp. 3d 1082 (SD Fla. 2014); *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc.*, 6 F. Supp. 3d 1272 (SD Fla. 2014); *Bone v. Vill. Club, Inc.*, 233 F. Supp. 3d 1203 (MD Fla. 2016).

⁴⁵ Patricia Marx, *Pets Allowed*, *The New Yorker*, (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed> (last visited Jan. 28, 2020).

The Florida Commission on Human Relations (FCHR) was created by the Legislature in 1969 to enforce the Florida Civil Rights Act and address discrimination issues.⁴⁶ FCHR's basic statutory responsibilities include addressing housing discrimination based on race, color, national origin, sex, disability, pregnancy, religion and familial status.⁴⁷

Licensure of Florida Health Care Practitioners

The Division of Medical Quality Assurance (MQA), within the Department of Health (DOH), has general regulatory authority over health care practitioners.⁴⁸ MQA works in conjunction with 22 boards and four councils to license and regulate seven types of health care facilities and more than 200 license types in over 40 health care professions.⁴⁹ Each profession is regulated by an individual practice act and by Ch. 456, F.S., which provides general regulatory and licensure authority for MQA.

Section 456.072, F.S., lists acts which constitute grounds for disciplinary sanctions for all health care practitioners. Each practice act provides grounds for discipline specific to that particular profession. Upon notification⁵⁰ that a licensed provider may be in violation of laws governing the profession or is otherwise a risk to the safety or health of the public, DOH may initiate an investigation into the allegations.⁵¹ Once the investigation concludes, a DOH attorney reviews the report and determines if a violation has occurred and whether emergency action is needed to prevent further harm to the public or if the standard disciplinary process is appropriate. The department may dismiss a case if it is legally insufficient or if the evidence is insufficient to pursue a disciplinary case. If a case is deemed legally sufficient,⁵² the case is presented to a probable cause panel⁵³ of the governing professional board. The probable cause panel reviews the investigatory materials to determine if probable cause exists for DOH to pursue disciplinary action. If probable cause exists, a DOH attorney may file an administrative complaint against the provider's license with DOH's Agency Clerk. DOH's case against the provider's license becomes public ten days after the administrative complaint is filed.

If there is a dispute as to the charges or to the facts, a hearing may be held before an administrative law judge (ALJ), who must examine all evidence presented and make a recommendation as to whether a violation occurred. If the ALJ determines a violation occurred, the board, or DOH if there is no board, issues a final order regarding the disciplinary action.⁵⁴ DOH has standing to challenge any final order of the board.

⁴⁶ Florida Commission on Human Relations, <https://fchr.myflorida.com/what-we-do> (last visited Jan. 28, 2020).

⁴⁷ Ch. 760, F.S.

⁴⁸ Health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractic physicians, podiatric physicians, naturopaths, dentists, dental hygienists, optometrists, nurses, advanced practice registered nurses, nursing assistants, pharmacists, midwives, speech language pathologists, audiologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, mental health counselors, marriage and family therapists, and psychotherapists, among others. S. 456.001(4), F.S.

⁴⁹ Florida Department of Health, Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2018-2019*, <http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/documents/annual-report-1819.pdf> (last visited Jan. 28, 2020).

⁵⁰ A Complaint may be filed against a health care practitioner or facility at www.flhealthcompliant.gov, which is a complaint portal collaboratively developed with the Agency for Healthcare Administration. A complaint against a licensed professional or entity or regarding unlicensed activity may be submitted. A complaint may also be submitted by U.S. Mail, fax, or email. The disciplinary process may also originate from other sources, such as a criminal or civil case or disciplinary action by another professional board.

⁵¹ Certain preliminary administrative procedures generally must be exhausted for a complaint against a health care provider within a correctional facility. S. 456.073(1), F.S.

⁵² A complaint is legally sufficient if it contains ultimate facts showing that a violation occurred. S. 456.073(1), F.S.

⁵³ Each regulatory board must provide by rule that the determination of probable be made by a panel of its members or by DOH. The Board is authorized to promulgate a rule allowing a former board member to serve on a probable cause panel, as long as he or she maintains an active license in that profession. All probable cause panels must include at least one present or former consumer member, if one is available, willing to serve, and is authorized by the board chair. S. 456.073(4), F.S.

⁵⁴ A final order for an emergency suspension or restriction of a license due to an immediate danger to the public health, safety, or welfare is issued by the Surgeon General or his or her designee. S. 456.073(8), F.S.

Administrative discipline may include a letter of concern, reprimand, fine up to \$10,000, restriction of practice or license, probation, and license suspension or permanent revocation.⁵⁵ In determining which sanction to impose, the board, or DOH if there is no board, will consider what sanctions are necessary to protect or compensate the public.

If a violation does not pose a substantial threat to public health, safety, and welfare or if there is no violation of the standard of care involving injury to a patient, DOH may issue a citation for the violation.⁵⁶ For a first offense, the citation is not considered discipline on the provider's license, but a second or subsequent citation is considered disciplinary.⁵⁷

Effect of Proposed Changes

CS/CS/HB 209 amends Florida's Fair Housing Act by prohibiting discrimination in housing rental to an individual with a disability needing an ESA. The bill defines an ESA as an animal that does not require training to perform specific work or perform special tasks for a person with a disability, but by virtue of its presence provides support to alleviate one or more identified symptoms or effects of a person's disability.

The bill requires a housing provider to offer equal access to a person with an ESA, and prohibits additional fees for an ESA. The bill permits a landlord to:

- Prohibit an ESA if it poses a direct threat to the safety, health or property of others; and
- Request additional information regarding an ESA when a person's disability or disability-related need is not readily apparent, including written documentation:
 - From a listed type of licensed health care practitioner;
 - Excluding any practitioner hired exclusively to provide such documentation.
 - Verifying applicant has a disability or disability-related need; and
 - Verifying the ESA provides support alleviating one or more symptoms or effects of a disability or disability-related need.

The bill requires FCHR to establish the format a health care practitioner must follow when providing ESA documentation to a patient and requires FCHR to adopt rules relating to ESA documentation requirements.

The bill creates a new cause for disciplinary action against a health care practitioner's license when the practitioner's only service to a patient is providing ESA documentation for a fee.

The bill creates the misdemeanor crime of falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an emotional support animal.

The bill makes an ESA's owner liable for any damages caused by his or her ESA and removes landlord liability for damage done by an ESA if the landlord approved a person's request for an ESA, and if a person's disability or disability-related need was not readily apparent, the landlord requested the appropriate written documentation verifying the disability-related need for the animal. The bill expressly indicates that the guidelines for ESAs do not apply to service animals.

The bill replaces all references to "handicap" under the Fair Housing Act and related statutes with "disability."

The bill provides an effective date of July 1, 2020.

⁵⁵ S. 456.072(2), F.S.

⁵⁶ S. 456.077, F.S.

⁵⁷ *Id.*

B. SECTION DIRECTORY:

- Section 1:** Creates s. 760.27, F.S., relating to prohibited discrimination in the rental of housing to persons with a disability or disability-related need who use an emotional support animal.
- Section 2:** Amends s. 413.08, F.S., relating to rights and responsibilities of an individual with a disability; use of a service animal; prohibited discrimination in public employment, public accommodations, and housing accommodations; penalties.
- Section 3:** Amends s. 419.001, F.S., relating to site selection of community residential homes.
- Section 4:** Amends s. 456.072, F.S., relating to grounds for discipline; penalties; enforcement.
- Section 5:** Amends s. 760.22, F.S., relating to definitions.
- Section 6:** Amends s. 760.23, F.S., relating to discrimination in the sale or rental of housing and other prohibited practices.
- Section 7:** Amends s. 760.24, F.S., relating to discrimination in the provision of brokerage services.
- Section 8:** Amends s. 760.25, F.S., relating to discrimination in the financing of housing or in residential real estate transactions.
- Section 9:** Amends s. 760.29, F.S., relating to exemptions.
- Section 10:** Amends s. 760.31, F.S., relating to powers and duties of commission.
- Section 11:** Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
The bill may have an indeterminate positive impact on the number of jail beds by creating a new misdemeanor offense for falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an emotional support animal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. The bill does not appear to affect county or municipal governments.

2. Other:

The Fourteenth Amendment of the U.S. Constitution provides no state shall deny to any person within its jurisdiction the equal protection of the laws. The Fourteenth Amendment prevents unreasonable discrimination based on the use of classification, thereby preventing laws that draw distinctions between individual classes based solely on differences that do not relate to a legitimate governmental objective. If a law distinguishes individuals based on the use of certain classifications, it may withstand an equal protection challenge if it is rationally related to a legitimate government objective.

The bill gives a landlord discretion to require certain information regarding a person's disability and/or disability-related need for an animal if and when he or she chooses, in a manner that may be interpreted by a court to indicate the landlord's preference for one type of disability over another, if the landlord does not treat all disabilities in the same manner. However, because the bill allows a landlord to request such information only when a person's disability or disability-related need is not known or readily apparent, the request may be rationally related to a legitimate government objective.

Because FHA provides only guidelines regarding what is appropriate for reasonable accommodation requests for ESAs, it is possible a court could interpret the bill to limit the federal protections provided to a person with a disability seeking a reasonable accommodation for an ESA. However, under subsection (2) of the bill, the provisions in the bill are explicitly subject to what is permitted under federal law.

B. RULE-MAKING AUTHORITY:

The bill requires DOH to adopt rules relating to administering ESA documentation requirements.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 59-70: As drafted, this paragraph could be interpreted to indicate that a landlord must request written documentation from a health care practitioner when a person's disability or disability-related need is not readily apparent. While a landlord is permitted to verify the existence of a disability and the need for the accommodation when either is not apparent, the landlord may not refuse a request because the requesting person did not follow formal procedures adopted by the landlord. As such, requiring written documentation prepared in a particular form as prescribed by FCHR may conflict with FHA guidelines. Modifying the language to allow written documentation in a form prescribed by FCHR or other written documentation from a healthcare professional may fix this potential conflict with FHA.

Lines 88-97: As drafted, this paragraph removes liability for a landlord who approves a reasonable accommodation request for an ESA and for a landlord who requested written documentation verifying a person's disability or disability-related need when either was not apparent. Based on the comments regarding lines 59-70, above, and in order to ensure liability is not removed for a landlord who negligently approves a request for an ESA, the following alternate language may be more appropriate.

(b) A landlord is not liable for any damage done to the premises or to any person on the premises by an emotional support animal authorized under this section, the federal Fair Housing Act, s. 504 of the Rehabilitation Act of 1973, or any other federal, state, or local law, including the following circumstances:

1. The landlord's approval of a reasonable accommodation request for an emotional support animal was not negligent.
2. When a requesting person's disability or disability-related need was not readily apparent, the landlord requested and received reliable verification of the requesting person's disability or disability-related need for an emotional support animal.

Lines 140-143: As drafted, this paragraph may limit a person's ability to gather required documentation for his or her reasonable accommodation request and may result in disciplinary action against a health care practitioner acting in good faith to provide such documentation. Modifying the language to capture only a practitioner who issues documentation without knowledge of the patient's disability or disability-related need for an emotional support animal may be more appropriate and less likely to be interpreted as limiting the provisions of federal law.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 14, 2019, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Requires a landlord to allow a person with a disability to keep an emotional support animal, if the person requests and receive approval from a landlord;
- Requires DOH to adopt rules relating to the format of a health care practitioner's written documentation regarding an emotional support animal; and
- Removes landlord liability for damage done by an ESA if the landlord approved a person's request for an ESA, and if a person's disability or disability-related need was not readily apparent, the landlord requested the appropriate written documentation verifying the disability-related need for the animal.

On January 16, 2020, the Children, Families, and Seniors Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Provides the FCHR the authority to create the form in rule.
- Authorizes the DOH to discipline a health care practitioner whose exclusive service is the preparation of the written documentation in exchange for a fee.

This analysis is drafted to the committee substitute as passed by the Children, Families, and Seniors Subcommittee.